A

HOMESTEAD ASSETS SDN BHD

v.

CONTRAMEC SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-22-663-2006]
9 DECEMBER 2008

C ***COMPANY LAW:*** *Winding up - Petition - Application for interlocutory injunction to restrain defendant from proceeding to present winding up petition against plaintiff - Whether there had been contractual relationship between the parties - Whether defendant by filing winding up petition against plaintiff was abusing legal process - Rules of the High Court* D *1980, O. 29 - Companies Act 1965, s. 218 - Bills of Exchange Act 1949, ss. 47, 57*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Rules of the High Court 1980, O. 29 - Restraining* E *defendant from proceeding to present winding up petition against plaintiff - Whether there had been contractual relationship between the parties - Whether defendant by filing winding up petition against plaintiff was abusing legal process - Companies Act 1965, s. 218 - Bills of Exchange Act 1949, ss. 47, 57*

F This was an interlocutory application (encl. 5) by the plaintiff/applicant for an interlocutory injunction pursuant to O. 29 of the Rules of the High Court 1980 to restrain the defendant/respondent from proceeding to present a winding up petition against the plaintiff pursuant to s. 218 of the Companies Act G 1965; pending the disposal of the main writ action in the present case. The main writ action in the present case by the plaintiff against the defendant was for a permanent injunction to restrain the defendant from proceeding to file a s. 218 of the Companies Act 1965 petition against the plaintiff based on an alleged unpaid H debt of RM286,265.29. Briefly, the plaintiff and the defendant entered into a formal contract to build a 22 storey condominium, with the plaintiff being the employer and the defendant the contractor. The plaintiff was not satisfied with the works as carried out by the defendant and alleged that the defendant I delayed in the completion of the project and failed to rectify defects. Despite all the plaintiff's complaints, the architect had

been issuing payment certificates in respect of works done by the defendant and the plaintiff had been honouring and paying the certificates right up to certificate no. 9. When the defendant did not take steps to remedy its defaults, the plaintiff by notice terminated the contract. The defendant on their part alleged that the plaintiff had failed to make progress payments in respect of works done, in particular payment in respect of certificate no. 10 for the sum of RM286,265.29. It was not disputed that pursuant to the certificate, the plaintiff had already issued to the defendant a cheque for the said sum but subsequently the plaintiff dishonoured the cheque, giving the reason that there was an error on the cheque but then failed to issue a fresh cheque. The defendant relied on cl. 30.3(i) of the contract between the parties and contended that the plaintiff had an undisputed obligation to pay. The non-payment of this alleged debt of the mentioned sum and the dishonouring of the cheque were the basis of the defendant's s. 218 notice. Apart from relying on the contract, the defendant, by reason of the dishonoured cheque, also relied on ss. 47 and 57 of the Bills of Exchange Act 1949. The issue that arose was whether the plaintiff had succeeded in establishing that there was an abuse of the process by the party to be restrained.

Held (dismissing application with costs):

(1) The defendant was not claiming a debt from the plaintiff out of the blue. The parties were no strangers to one another. Prior to the dispute that led to the issuance of the s. 218 notice, there had been a serious on-going contractual relationship between them that involved a huge sum of money. The intended petition – if presented – is yet to be heard and determined. The intended petition must be pre-judged by this court. However, on the facts and evidence, which were largely undisputed, in particular, the issuance of the certificate no. 10 by the architect, the wording and effect of cl. 30.3(i) of the contract, the non-payment by the plaintiff of the sum specified in the certificate, the dishonouring of the cheque, and the effect of ss. 47 and 57 of the Bills of Exchange Act, it could not fairly be said that the defendant by filing a winding up petition against the plaintiff was abusing the legal process. (para 22)

Case(s) referred to:
Bryanston Finance Ltd v. De Vries (No 2) [1976] 1 All ER 25 ***(not foll)***
Malayan Banking Bhd v. Red Box (M) Sdn Bhd [2000] 6 CLJ 21 HC ***(not foll)***
Rinol Malaysia Sdn Bhd v. MFRP Marketing Sdn Bhd [2003] 4 CLJ 142 HC ***(not foll)***

Legislation referred to:
Companies Act 1965, s. 218
Rules of the High Court 1980, O. 29
Bills of Exchange Act 1949, ss. 47, 57

For the plaintiff - Sanjay Mohan; M/s Lee Hishamudin, Allen & Gledhill
For the defendant - Avtar Singh; M/s Zubeda & Amarjeet

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 5 is an interlocutory application by the plaintiff/applicant for an interlocutory injunction pursuant to O. 29 of the Rules of the High Court 1980 to restrain the defendant/respondent from proceeding to present a winding up petition against the plaintiff pursuant to s. 218 of the Companies Act 1965; pending the disposal of the main writ action in the present case.

[2] The main writ action in the present case by the plaintiff against the defendant is for a permanent injunction to restrain the defendant from proceeding to file a s. 218 (of the Companies Act 1965) petition against the plaintiff based on an alleged unpaid debt of RM286,265.29. It is common ground that, prior to the filing of the present writ action, the s. 218 notice had already been served by the defendant on the plaintiff on 26 April 2006. If not restrained by this court, the next step that will taken by the defendant, would be the presentation of a winding up petition in the Winding Up Court. And this is what the plaintiff fears.

[3] I have dismissed the present interlocutary application (encl. 5) with costs. In my view it is the principle that this court must respect and protect the defendant's right to file the winding up petition – a right conferred by statute, namely, s. 218 of the Companies Act 1965 – if the defendant honestly thinks that they

have the right to do so, so long as the exercise of such a right is not an abuse of process. This basic principle was laid down in *Bryanston Finance Ltd v. De Vries (No. 2)* [1976] 1 All ER 25, a decision of the English Court of Appeal, wherein Buckley LJ said:

> It has long been recognised that the jurisdiction of the court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same consideration must apply to a *quia timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would be petitioner should not be restrained from exercising it except on clear and pursuasive grounds.

[4] But this does not mean that a would be petitioner can never at all be restrained by the court from presenting a winding up petition: he can be and ought to be restrained where the circumstances are such that he ought to be so restrained in the interest of justice. In Bryanston Finance Buckley LJ explains the guiding principle in the following manner:

> In his speech in the *American Cyanamid case* [1975] AC 396 Lord Diplock recognised that there might be special factors to be taken into consideration in the particular circumstances of individual cases. In my judgment, the fact that the second action is an action designed to prevent the commencement of proceedings *in limine* is such a special factor. In such a case the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish *prima facie* that the plaintiffs will succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process. In the present case, in my opinion, this has not been achieved. I would consequently allow the appeal in the second action and discharge the injunction of May 15, 1975.

[5] In short, the above judgment enunciated the 'abuse of process' principle. But it is important to note from the above passages that the party who alleges that there is an abuse of process (and in the context of the present case, it is the plaintiff) must satisfy this court with:

> ... clear and pursuasive grounds.

[6] In enunciating the above principles, the English Court of Appeal also makes it clear that the *American Cyanamid* principles do not apply in an interlocutory application to restrain the filing of an winding-up petition. Apart from what has been explained by Buckley LJ above on the applicability of the principles in exceptional cases, Stephen LJ, in the same judgment, said (and more directly on the point):

> This is not 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right,' but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in *American Cyanamid* case which Buckley LJ quoted do not apply to such an application as this.

[7] The principles in *Bryanston Finance* have been followed by our courts in *Malayan Banking Bhd v. Red Box (M) Sdn Bhd* [2000] 6 CLJ 21 and *Rinol Malaysia Sdn Bhd v. MFRP Marketing Sdn Bhd* [2003] 4 CLJ 142. However, in *Rinol Malaysia* Zaleha Zahari J (as she then was) said:

> In the circumstances I am not therefore in agreement with the plaintiff company's contention that it is incumbent upon the defendant to satisfy this court in these proceedings that the said sum is in fact due and owing by the plaintiff company to the defendant. On the contrary I hold that, in proceedings such as this, it is incumbent upon the plaintiff to not merely raise a question to be tried as envisages by Lord Diplock in the *American Cyanamid* [1975] AC 396, but also has the added responsibility of proving a *prima facie* case that the intended petition is bound to fail on the following authorities.

[8] And then the learned judge proceeded to quote the passages in *Bryanston Finance* that I have already quoted earlier in this judgment.

[9] With respect, I am unable to share with such a view. To my mind the question of discharging:

> the **added** responsibility of proving a *prima facie* case that the intended petition is bound to fail on the following authorities. (emphasis added)

does not arise at all. In my opinion, the plaintiff/applicant does not have an 'added responsibility'. My understanding of the judgments of the Lord Justices in *Bryanston Finance* is that the *American Cyanamid* principles have no place at all in determining an

interlocutory application for an interlocutory injunction to restrain the filing of a winding up petition. The court must only focus on one issue: has the plaintiff succeeded in establishing that there is an abuse of process by the party to be restrained. In other words, the abuse of process principle is the only principle to be applied. I think the learned judges in *Bryanston Finance* had taken pains to stress this point. I have already referred to the relevant passages in the judgments of Buckley and Stephenson LJJ. Now, for the sake of completeness, I shall also refer to the judgment of Sir John Pennycuick in the same case, and it is as follows:

> The decision in the *American Cyanamid* case was, as I understand it, addressed to interlocutory motions seeking interim relief pending determination of the rights of the parties at the hearing of the action: cf. per Lord Diplock. He said, at p. 405: 'The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.' And at p. 406:
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> > When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.
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> I do not think that the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action and more particularly motions seeking to stop proceedings *in limine*. I appreciate the wide words used by Lord Diplock, at p. 406:
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> > In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions.
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> But these words must be read in their context and I am sure Lord Diplock was not intending to say that the principles were applicable in a class of case under consideration in which their application would be entirely inappropriate.

[10] Thus the question arises: is the would-be petition by the defendant in the present case an abuse of process? In my judgment, on the evidence and the facts, the plaintiff/applicant (the party who bears the burden of proving) had failed to satisfy this court that the intended petition, if proceeded with by the defendant, would constitute an abuse of process.

[11] At this juncture may I pause for a moment to remark that, having read the written submissions of the learned counsel for the plaintiff/applicant (encls. A(5) and C(5)), I find that, with respect, he has failed to address the issue as to the principles of law applicable considering that this is an interlocutory application (seeking an interlocutory injunction) and that at this juncture we are not dealing with the main action (seeking a permanent injunction) itself.

[12] In the present case before me, I do not find the facts of the case as pointing to any abuse of process by the defendant. Indeed, I do not think that it can be fairly said that *prima facie* the defendant has no basis at all in serving the s. 218 notice on the plaintiff. The defendant is not claiming a debt from the plaintiff out of the blue. The parties are no strangers to one another. Prior to the dispute that led to the issuance of the s. 218 notice, there had been a serious on-going contractual relationship between them that involves a huge sum of money. That relationship came about as follows. The plaintiff and the defendant had on 22 March 2005 entered into a formal contract to build a 22 storey condominium, with the plaintiff being the employer and the defendant the contractor. It was a PAM standard form contract. The contract sum was RM29,217,520.11. The defendant had to complete the construction of the condominium within 20 months. The defendant had carried out the works. But the plaintiff was not satisfied with the works as carried out by the defendant. The plaintiff alleges that the defendant delayed in the completion of the project and failed to rectify defects. This allegation is not seriously disputed by the defendant. The plaintiff points out to the fact that the architect had issued to the defendant all in all three letters reminding the defendant of the delay and to make good the defects. The first letter was dated 24 November 2005 and the third letter was dated 24 February 2006. When the defendant failed to progress the works and to make good the defects, the architect issued the defendant a notice dated 29 March 2006 notifying the defendant to rectify the defaults.

[13] But it is pertinent to point out that (and this fact is also not disputed) despite all the plaintiff's complaints, the architect had been issuing Payment Certificates in respect of works done by the defendant, and the plaintiff had been honouring and paying the Certificates right up to Certificate No. 9.

[14] When the defendant did not take steps to remedy its defaults, the plaintiff by notice terminated the contract on 20 April 2006.

[15] The defendant on their part alleges (and these are not disputed) that the plaintiff had failed to make progress payments in respect of works done, in particular, payment in respect of Certificate No: 10 for the sum of RM286,265.29, which certificate was issued to the plaintiff by the plaintiff's own architect on 7 March 2006. In fact, it is also not disputed that pursuant to the certificate, the plaintiff had on 3 April 2006 already issued to the defendant a cheque for the sum of RM286,265.29, but subsequently the plaintiff dishonoured the cheque on 15 April 2006 giving the reason that there was an error on the cheque. But the plaintiff failed to issue a fresh cheque.

[16] The defendant relies on cl. 30.3(i) of the contract between the parties and contends that the plaintiff has an undisputed obligation to pay. This clause reads:

> Unless otherwise expresssly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount certified as due under any Architect's certificates by reason of any claims to set-off or counter-claims or allegation of defective works, materials or goods or for any other reasons whatsoever which he may purport to excuse him from making payments of the amount stated to be due in an Interim Certificate.

[17] Because of this nonpayment by the plaintiff, as well as the dishonouring of the cheque, the defendant terminated the contract on 17 April 2006.

[18] The nonpayment of this alleged debt of RM286,265.29 and the dishonouring of the cheque are the basis of the defendant's s. 218 notice. Apart fron relying on the contract, the defendant, by reason of the dishonoured cheque, also relies on ss. 47 and 57 of the Bills of Exchange Act 1949.

[19] Section 47 of the Bills of Exchange Act states:

> **47. Dishonour by non-payment**
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> (1) A bill is dishonoured by non-payment:
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> (a) when it is duly presented for payment and payment is refused or cannot be obtained; or

A (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

B **[20]** Section 57 of the same Act states:

57. Measure of damages against parties to dishonoured bill

Where a bill is dishonoured, the measure of damages, which shall C be deemed to be a liquidated amount, shall be as follows –

(a) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or D from the drawer, or from a prior indorser:

(i) The amount of the bill;

(ii) …

E **[21]** The plaintiff, on the other hand, contends that the provisions of the Bills of Exchange Act do not apply to the facts of the present case.

[22] Lest that I am misunderstood, I wish to make it clear that I F am not in any way suggesting in this judgment that the defendant will certainly succeed in his intended petition, should ever they were to file one. The intended petition – if presented – is yet to be heard and determined. The intended petition must not be pre-judged by this court. However, be that as it may, on the facts G and evidence, which are largely undisputed, in particular, the issuance of the Certificate No: 10 by the architect, the wording and effect of cl. 30.3(i) of the contract, the non-payment by the plaintiff of the sum specified in the Certificate, the dishonouring of the cheque, and the effect of ss. 47 and 57 of the Bills of H Exchange Act, it cannot fairly be said that the defendant by filing a winding up petition against the plaintiff is abusing the legal process. Hence the plaintiff's present application must fail.

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